IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 226.

JOHN T. NEW, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF OKLAHOMA.

Brief for Plaintiff in Error in Reply to Supplemental Brief for the Territory.

The question of the jurisdiction of this court was raised for the first time at the hearing, and counsel for plaintiff in error regrets that lack of time has precluded more than a hasty examination of it and that its consideration must of necessity be limited to the points suggested in defendant's supplemental brief, which was received on Thursday last.

Section 6 of the act of Congress of February 6, 1889, 25 Stats. 655, 656, referred to in the supplemental brief, provides for the allowance of writs of error to this court as a matter of right—

> "in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States."

It is contended on behalf of the Territory that its courts are not "courts of the United States," but merely "legislative courts," and hence the act has no relation to them.

If the words, "any court of the United States," used in the act were intended by Congress to apply solely to the courts created under the authority of article 3 of the Constitution, then undoubtedly the position is correct, but counsel for plaintiff in error respectfully submits the following considerations in support of the contrary view:

That Congress gets its powers to create courts and governmental agencies of every kind from the Constitution of the United States must be admitted.

The framers of the Constitution, deeming one supreme judicial court necessary in the federal scheme of government, provision was made for it in that instrument; other courts inferior to the Supreme Court would also be necessary in the administration of the affairs of the Federal Government and provision was made for their creation by Congress.

Some of these courts would necessarily exercise their functions in localities where the jurisdiction of the United States would not be exclusive, as in the States of the Union, and others would exercise their functions in localities where the jurisdiction of the United States would be exclusive, as in the district which would become the seat of government and the territory of the United States not included within the limits of a State.

The several provisions of the Constitution relating to judicial administration should be considered and construed together in determining the relations which they bear to each other under the Constitution and the acts of Congress.

The first mention of courts in the Constitution is in clause 9 of section 8 of article 1, where it is said that Congress shall have power "to constitute tribunals inferior to the Supreme Court."

By section 1 of article 3 provision is made for the creation of inferior courts of the kind first mentioned above, whose functions were to be exercised in States where the jurisdiction of the United States was not exclusive; in view

of other provisions of the instrument this section should be construed as if it read:

> "The judicial power of the United States" (in so far as its exercise is concerned in the States where the federal jurisdiction is not exclusive) "shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," etc.

By clause 17 of section 8 of article 1, Congress is given power:

"To exercise exclusive legislation in all cases whatsoever," over the district which may become the seat of government. To this clause is to be referred the power of Congress to create courts and subordinate governments in the District of Columbia.

By clause 2 of section 3 of article 4, it is provided that Congress shall have power to make "all needful rules and regulations" respecting the territory of the United States. The power of Congress to establish courts and subordinate governments in the Territories has been referred to this clause.

As to all places such as the District of Columbia and the Territories, where the federal jurisdiction is exclusive, the constitutional power of Congress to create courts is plenary, and not subject to the limitations contained in article 3, as to the tenure of office of the judges, etc.

In considering the relations to particular circumstances, of both kinds of these inferior courts, they have sometimes been designated in contradistinction to each other as "constitutional courts" and as "legislative courts," and the latter have, in the decisions of this court and in the legislation of Congress, been designated as "courts of the United States;" inasmuch as they, equally with the courts created under article 3, have a constitutional warrant for their existence, no reason is apparent why they may not be properly designated as "courts of the United States," and treated to all

intents and purposes as such; and at least as falling within the words when used in an act of Congress unless necessarily excluded by the context or other sufficient reason.

One instance will serve as an illustration: Section 29 of the act of May 2, 1890, the organic act of the Territory of Oklahoma, after defining the limits of the Indian Territory, proceeds as follows:

> "And the jurisdiction of the *United States Court* established under and by virtue of an act entitled, An act to establish a *United States Court* in the Indian Territory and for other purposes, approved March 1, 1889, is hereby limited to," etc.

The Court of Appeals of the District of Columbia had before it in the case of Moss *vs.* U. S., 32 Wash. Law Rep. 342, the question whether the Supreme Court of Columbia was a "court of the United States," and held that it was. In the opinion of the court, which was delivered by Mr. Chief Justice Alvey, several decisions of this court are cited in which the courts of the District of Columbia are referred to as "courts of the United States," and it is held that the courts established under provisions of the Constitution, other than those contained in article 3, are equally with those established under that article "courts of the United States for the administration of the laws of the United States."

The case of McAllister *vs.* U. S., 141 U. S. 174, is cited in defendant's brief as sustaining the contention, but it is submitted that the views above expressed are not inconsistent with the decision in that case, rightly considered. The court say, after citing a number of its previous decisions:

> "These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that courts in the Territories created under

> the plenary municipal authority that Congress possesses over the Territories of the United States are not courts of the United States created under the authority of that section."

But because the court held in the case of McAllister that, as district judge for the District of Alaska, he was not a judge of a "court of the United States" within the meaning of the words as used in section 1768, R. S. U. S., it does not follow that the courts of the Territory are not to be considered as courts of the United States within the meaning of other acts of Congress.

We are not unmindful of the fact that this court held in the case of Cross *vs.* U. S., 145 U. S. 571, that the act of 1889 did not contemplate a writ of error to an appellate court; but an observation of the court in the case is important in an aspect of the case at bar, which will be shown presently. That observation was as follows:

> "And moreover, if the disposal of the motion turned on this point, the words 'any court of the United States' are so comprehensive that used as they are in connection with convictions subject to the penalty of death, the conclusion might be too technical that Congress intended to distinguish between courts of one class and of the other."

The Jurisdiction of This Court to Entertain the Writ of Error is Not Necessarily Dependent Upon the Act of 1889.

Section 9 of the organic act provides for district courts and a Supreme Court among others, who are to possess—

> "chancery as well as common law jurisdiction and authority for the redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property;"—

and further provides that "writs of error, bills of exception and appeals shall be allowed in all cases from the final de-

cisions of the district courts to the Supreme Court," and that—

> "Writs of error from the final decisions of the Supreme Court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States"—

where the value of the property or the amount in controversy shall exceed $5,000.

Plaintiff in error contends that under other provisions of the organic act, when considered in connection with the act of March 3, 1891, establishing circuit courts of appeal, the appellate jurisdiction of the Supreme Court of the United States is extended to capital cases decided in the Territorial Supreme Court.

By section 28 of the act "the Constitution and all laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States." It is apparent from this section that Congress intended that the people of the Territory should be on the plane of equality with their fellow citizens elsewhere, in the enjoyment of rights and privileges, respecting judicial procedure and otherwise, in and out of court, secured by the Constitution and laws of the United States.

From section 13 of the act it appears that the courts of the Territory were to exercise "jurisdiction as circuit and district courts of the United States." It follows that any law of the United States then in existence or thereafter to be passed relating to remedies or to the rights otherwise of parties to cases in the district and circuit courts of the United States should be extended to parties similarly situated in the courts of the Territory.

By the judiciary act of March 3, 1891, circuit courts of appeal were established in each circuit. By section 4 of the

act the appellate jurisdiction of the circuit courts was abolished; and by section 6 of the act jurisdiction was conferred upon the circuit courts of appeals to review by appeal or writ of error the final decisions of the district and circuit courts in all cases except those mentioned in section 5 of the act, and the decisions of the circuit courts of appeals was made final.

Among the cases excepted in section 5 were "cases of conviction of a capital crime." As to these section 5 provided that a writ of error or appeal should lie directly to the Supreme Court. The circuit courts of appeal have therefore no appellate jurisdiction from the district or circuit courts in a capital case.

By the 15th and last section of the act it is provided that the several Territories shall by order of this court be assigned to particular circuits, and the Territory of Oklahoma was assigned by the court to the eighth judicial circuit on May 11, 1891 (139 U. S. 707); and it further provides that in all cases in which the judgments of the circuit courts of appeal are made final by the act that such courts—

> "shall have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders, and decrees of the Supreme Courts of the several Territories as by this act they may have to review the judgments, orders, or decrees of the district court and circuit court."

As no jurisdiction was conferred upon the circuit courts of appeal to review the judgments of the district or circuit Courts in a capital case they acquired by section 15 no appellate jurisdiction to review the judgment of a Territorial Supreme Court in a capital case, and if in such a case there is no appellate jurisdiction in this court to review the judgment of the Territorial Supreme Court, the singular anomaly is presented that under the law the judgments of the Territorial Supreme Courts in cases less than capital are subject

to review on writ of error or appeal, while in capital cases their judgments are final.

This could not have been intended by Congress. The act of May 2, 1890, requires that the capital case, like all others, shall be first reviewed in the Supreme Court of the Territory, and to preserve the doctrine of equality under the Constitution and laws of the United States between the people of the Territory and their fellow citizens elsewhere in the matter of rights and remedies, including the boon of an appeal to this court, it follows that the Supreme Courts of the Territories in such cases should stand in the same relation to this court that the circuit courts do in the matter of such appeal, in order that discrimination should be avoided as to persons in the same relative situations.

In Queenan *vs.* Oklahoma, 190 U. S. 548, this court entertained jurisdiction of a writ of error to the Oklahoma Supreme Court in a capital case. In doing so, if not actuated by considerations such as are above expressed, it was actuated by stronger ones.

HUGH T. TAGGART,
Attorney for Plaintiff in Error.